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Error to Circuit Court, Prince Edward County.

Action by one Allen and others against the Norfolk & Western Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

*Kirkpatrick & Howard*, of Lynchburg, and *Marshall McCormick*, of Roanoke, for plaintiff in error:

*E. Warren Wall*, of Farmville, and *Coleman, Easley & Coleman*, of Lynchburg, for defendants in error.

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SCOTT'S EX'R *v.* CHESTERMAN.

June 10, 1915.

[85 S. E. 502.]

**1. Exceptions, Bill of (§ 7\*)—Setting Forth Errors—Rulings on Evidence.**—A bill of exceptions, calling in question the admissibility of evidence, considered, though it was subject to the criticism that it was unduly protracted and somewhat confused.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 9; Dec. Dig. § 7.\* 5 Va.-W. Va. Enc. Dig. 380; 14 Va.-W. Va. Enc. Dig. 417; 15 Va.-W. Va. Enc. Dig. 361.]

**2. Customs and Usages (§ 12\*)—Building Contracts—Obligation of Parties—Evidence.**—A building contract required the contractor to furnish all materials and labor of every description for the performance of the work and lay out his work and be responsible for its correctness, and provided that any dispute as to the construction of the specifications should be determined by the architect, whose decisions should be final. A question as to whose duty it was to underpin the wall of a building while excavation for the foundation was being done was submitted to the architect, who decided that it was the duty of the contractor so to do. Held, that evidence that custom did not include in the contract underpinning was inadmissible, in the absence of proof that the owner or architect knew of the custom, or that the architect was guilty of fraud.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 23, 24; Dec. Dig. § 12.\* 13 Va.-W. Va. Enc. Dig. 416; 14 Va.-W. Va. Enc. Dig. 1041; 15 Va.-W. Va. Enc. Dig. 1026.]

**3. Customs and Usages (§ 16\*)—Evidence—Admissibility.**—Evidence of custom will not be admitted under the guise of explaining a contract to ingraft on it a new provision on which to base a defense, especially when the custom is not pleaded.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 27, 28; Dec. Dig. § 16.\* 13 Va.-W. Va. Enc. Dig. 416; 14 Va.-W. Va. Enc. Dig. 1041; 15 Va.-W. Va. Enc. Dig. 1026.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**4. Customs and Usages (§ 12\*)—Evidence—Effect.**—Knowledge of a custom must be brought home to a party to a contract to be affected thereby, unless it is so uniform as to raise a *prima facie* presumption that he knew of it.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 23, 24; Dec. Dig. § 12.\* 13 Va.-W. Va. Enc. Dig. 416; 14 Va.-W. Va. Enc. Dig. 1041; 15 Va.-W. Va. Enc. Dig. 1026.]

**5. Customs and Usages (§ 17\*)—Customs Affecting Performance of Contract.**—A custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.\* 13 Va.-W. Va. Enc. Dig. 415; 14 Va.-W. Va. Enc. Dig. 1041; 15 Va.-W. Va. Enc. Dig. 1026.]

**6. Trial (§ 252\*)—Instructions—Applicability to Evidence.**—It is error to give an instruction where there is no evidence justifying it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\* 7 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 513.]

**7. Contracts (§ 286\*)—Building Contracts—Rights and Liabilities of Parties.**—A building contract required the contractor to do the work within a specified time in good workmanlike and substantial manner, to the satisfaction of the owner and under the direction of the architect, to be testified to by a writing or certificate under his hand, and that final payment should be made on completion of the building to the satisfaction of the owner and the architect. The building after completion was turned over to the owner and received by him without objection. A few days later he confined his objection to the concrete basement walls and these were remedied. The contractor sent to the architect a bill for the balance due and he indorsed thereon the letters "O. K." with his initials. Subsequently he stamped the bill, "Approved." There was evidence that the owner knew of the first indorsement by the architect. Held, that the first indorsement was a sufficient certification of approval by the architect to sustain an action by the contractor for the balance due.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1305; Dec. Dig. § 286.\* 3 Va.-W. Va. Enc. Dig. 320; 14 Va.-W. Va. Enc. Dig. 245; 15 Va.-W. Va. Enc. Dig. 207.]

**8. Contracts (§ 286\*)—Building Contracts—Approval by Architect—Sufficiency.**—Where a building contract stipulates for approval of the work by an architect by a writing or certificate, any writing, fairly carrying out the purposes intended, is sufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1305; Dec.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Dig. § 286.\* 3 Va.-W. Va. Enc. Dig. 320; 14 Va.-W. Va. Enc. Dig. 245; 15 Va.-W. Va. Enc. Dig. 207.]

**9. Damages (§ 123\*)—Building Contracts—Defective Work—Measure of Damages.**—The measure of damages for defective work in the contractor of a building is the difference between the value of the building according to the contract, the contract price, and the value of the building as actually completed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.\* 4 Va.-W. Va. Enc. Dig. 183; 14 Va.-W. Va. Enc. Dig. 303; 15 Va.-W. Va. Enc. Dig. 251.]

**10. Contracts (§ 300\*)—Building Contracts—Delay in Completion of Work—Liability of Parties.**—A building contract stipulated that the contractor should observe all city ordinances and regulations of building inspection. City ordinances provided for building permits. The contractor applied for a building permit, basing his application on the original specifications calling for an excavation for foundation of a depth of 12 feet, but before the application was made the plans were modified by agreement calling for an excavation 14 feet in depth. Subsequently the building inspector, on discovering the change in plans, ordered the work stopped, and no progress was made on the work until about two months later. Held, that the contractor was alone responsible for the delay caused by the action of the building inspector.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. § 300.\* 4 Va.-W. Va. Enc. Dig. 183; 14 Va.-W. Va. Enc. Dig. 303; 15 Va.-W. Va. Enc. Dig. 251.]

**11. Damages (§ 120\*)—Building Contracts—Delay in Completion of Work.**—A contractor, delaying the construction of buildings for the owner, having tenants ready and eager to occupy the buildings as soon as completed, is liable for loss of rents which the owner would have received but for the delay, and the loss could not be limited to the time the buildings were turned over to the owner.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.\* 4 Va.-W. Va. Enc. Dig. 183; 14 Va.-W. Va. Enc. Dig. 303; 15 Va.-W. Va. Enc. Dig. 125.]

**12. Contracts (§ 353\*)—Action for Breach—Instructions.**—An instruction on the issue whether an owner, employing a contractor to erect a building, waived damages for defective work, which left to the jury to determine whether the owner accepted the building as in compliance with the contract, and which stated that the jury might consider when, to what extent, and in what manner the owner expressed, if at all, his dissatisfaction with the work, and whether by any acts or conduct during the progress of the work, or after alleged substantial completion and the surrender of the building to the owner,

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

he waived any objection he might fairly have made to any of the work, was misleading because failing to define what acts would indicate such an acceptance, and what acts would indicate such a waiver, especially where the court also limited the alleged waiver to an intent to waive, knowing at the time that he was waiving his rights, and that it should plainly appear that he knew his rights and intended to waive them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. § 353.\* 7 Va.-W. Va. Enc. Dig. 716; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 512.]

**13. Appeal and Error (§ 1064\*)—Prejudicial Error—Misleading Instructions.**—Any instruction calculated to mislead the jury, whether arising from ambiguity or any other cause, is ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\* 7 Va.-W. Va. Enc. Dig. 726; 14 Va.-W. Va. Enc. Dig. 562; 15 Va.-W. Va. Enc. Dig. 509.]

Error to Circuit Court of City of Richmond.

Action by W. A. Chesterman against John G. Scott, as executor of W. H. Scott, deceased. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

*A. G. Collins* and *R. E. Scott*, both of Richmond, for plaintiff in error.

*Meredith & Cocke*, of Richmond, for defendant in error.

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JOHNSTON et al. v. COMMONWEALTH ex rel. PERRY.

June 10, 1915. On Petition to Rehear, June 24, 1915.

[85 S. E. 566.]

**1. Insane Persons (§ 42\*)—Committee—Settlement of Accounts—Conclusiveness.**—Under Code 1904, § 2699, providing that accounts of committees of insane persons before the commissioner of accounts shall, after confirmation, be taken to be correct, except so far as it might be surcharged and falsified in a suit in proper time, in a suit to recover from the committee and his surety the amount charged against him on settlement of his account before the commissioner of accounts, it cannot be shown that the amount had been legitimately expended at the time of the settlement.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 64-67; Dec. Dig. § 42.\* 7 Va.-W. Va. Enc. Dig. 690; 14 Va.-W. Va. Enc. Dig. 559; 15 Va.-W. Va. Enc. Dig. 507.]

**2. Insane Persons (§ 42\*)—Committee—Settlement of Accounts—Grounds for Opening.**—A bill, merely seeking to correct an error

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.